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No. 86-1829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

MICHAEL JOSEPH *
THOMAS L. MILLS
E. ALEX BLANTON
DYER, ELLIS, JOSEPH & MILLS
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 944-3040

PAUL S. BILGORE
GERALD A. COSTELLO
ARCO Center
300 Oceangate
Long Beach, CA 90801
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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I. SUBSEQUENT EVENTS HAVE NOT DIMINISHED THE NEED FOR REVIEW.

While the federal respondents share petitioner's view that the lower court's decision rests on an unduly expansive application of section 4(b) of the APA (Mem. 4), they believe that the Maritime Administration's adoption of its third CDS payback rule has rendered moot the lower court's decision vacating the second payback rule. Other respondents correctly observe that litigation challenging the new rule has already been commenced (Sea-

train Br. 7)[1] and suggest that a spending prohibition in the Supplemental Appropriations Act for fiscal 1987 has invalidated the rule (Overseas Shipholding Br. 7).[2] The federal respondents' optimism that their new rule will survive yet another examination by the lower court is gratifying, but hardly adequate basis for concluding that the case is moot, even "as a practical matter" (Mem. 4).

The similarity between the present case and *Vermont Yankee*, 435 U.S. 519, extends even to the present procedural posture. In *Vermont Yankee*, as here, the agency had promulgated a new rule to replace the one vacated by the court of appeals. There, as here, the Solicitor General thought that this Court's review was not yet warranted. But also here, as there, the case gives rise to "questions of such significance in this area of the law as to warrant granting certiorari and deciding the case." 435 U.S. at 535-536 n. 14.

II. THE PRIVATE RESPONDENTS MISSTATE THE LOWER COURT'S HOLDING.

The private respondents contend variously that the court of appeals merely held that the agency failed to explain why it exercised its discretion as it did (Seatrain Br. 8), that it ignored and brushed aside certain statutory objectives (Overseas Shipholding Br. 6), that it failed to explain how its payback rule served the Merchant Marine Act (Alaska Bulk Br. 5), or that the court could not itself substitute its own reasoning for the agency's (Independent Tanker Br. 5). None of them, however, disputes petitioner's description of the agency's reasoning (Pet. 3-4) or denies that the court of appeals

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[1] Independent U.S. Tanker Owners Committee v. Dole, Civil Action No. 87-1685 (D. D.C.). One of the complaints advances twelve different reasons for the court to overturn the rule.

[2] See also, H.R. 2763, 100th Cong., 1st Sess., proposing spending prohibitions with respect to future CDS payback in the 1988 appropriations bill.

acknowledged that it understood that reasoning (Pet. 12a-13a) or that the same court had previously recognized the consistency of that reasoning with the underlying statute (Pet. 5).

Whether the lower court's interpretation of the APA is novel or of long standing, its holding was that even when the reviewing court understands why the agency took the action under review, the requirement for "a concise general statement of . . . basis and purpose" will mandate reversal of the action if the agency fails also to explain how its reasons are consistent with the statute.[3] The question presented is whether the APA allows reviewing courts thus to substitute a requirement for legal analysis by the agency for the court's own responsibility to decide whether the agency's action is lawful.

Respectfully submitted,

MICHAEL JOSEPH *
THOMAS L. MILLS
E. ALEX BLANTON
DYER, ELLIS, JOSEPH & MILLS
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 944-3040

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GERALD A. COSTELLO
ARCO Center
300 Oceangate
Long Beach, CA 90801
Counsel for Petitioner

* Counsel of Record

[3] One brief in opposition argues that the decision below must reflect "settled APA principles" because it was the unanimous opinion of a "philosophically diverse panel" (Alaska Bulk Br. 3-4). Assuming the accuracy of the characterization of the panel, it might also demonstrate the extent to which its expansive view of the APA pervades the court.